UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

1621 ROUTE 22 WEST OPERATING COMPANY, LLC d/b/a SOMERSET VALLEY REHABILITATION & NURSING CENTER	)	
Employer	)	
and	)	Case No. 22-RC-13139
1199 SEIU UNITED HEALTHCARE WORKERS EAST NEW JERSEY REGION	)	
Petitioner	)	

PETITIONER'S ANSWERING BRIEF TO THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

1621 ROUTE 22 WEST OPERATING COMPANY, LLC d/b/a SOMERSET VALLEY REHABILITATION & NURSING CENTER	)	
Employer	)	
and	)	Case No. 22-RC-13139
1199 SEIU UNITED HEALTHCARE WORKERS EAST NEW JERSEY REGION	)	
Petitioner	)	

PETITIONER'S ANSWERING BRIEF TO THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

Petitioner, 1199 SEIU United Healthcare Workers East, New Jersey Region ("Union"), files this answering brief to the Exceptions to the Hearing Officer's Report and Recommendations on Objections, filed by the Employer, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation & Nursing Center ("Employer"), Case No. 22-RC-13139. As discussed below, the Hearing Officer's findings and recommendations are fully supported by the record and case law.

PRELIMINARY STATEMENT

Pursuant to a Stipulated Election Agreement, an election was held on September 2, 2010.[1] The Union won the election by a ten vote margin, 38 to 28, with five challenges.[2] The Employer filed 14 Objections to the conduct affecting the results of the election. It withdrew Objections 8 and 14 at the hearing. In its Exceptions, it did not challenge the Hearing Officer's findings with respect to Objections 9 and 10.

In order to set aside the election results, the Employer bears the burden of proof and its burden is a heavy one. *Lily Transportation*, 352 NLRB 1028 (2008). Its burden is particularly steep here because such a large number of the Employer's exceptions are to the Hearing Officer's credibility findings. It is well-established that the Board will not overrule a Hearing Officer's credibility resolutions unless a clear preponderance of all relevant evidence convinces the Board that the findings are incorrect. *Stretch-Tex Co.,* 118 NLRB 1359 (1957).

ARGUMENT

A. THE EVIDENCE FAILS TO ESTABLISH THAT THE INTEGRITY OF THE ELECTION WAS COMPROMISED (Objections 5, 6 and 7)

The Employer excepts to the Hearing Officer's findings pertaining to the integrity and secrecy of the election. The Hearing Officer thoroughly examined the record evidence and made detailed credibility determinations in finding that the integrity of the election was not compromised. Relying on established Board precedent, the Hearing Officer found that the

---

[1] The Hearing Officer's Report is referred to as "Report." The Employer's Exceptions and Brief in Support of Exceptions are referred to as "Exceptions" and "Brief," respectively. References to the transcript are identified as "Tr." References to the exhibits of the Board, the Employer and Petitioner are referred to as "Bd. Ex. __," "Er Ex.___" and "Pet. Ex ___."

[2] The Regional Director's Report on Objections and Notice of Hearing contained an error in that it states that the approximate number of eligible voters was 60. Bd. Ex. 1. A review of the Excelsior List, Er. Ex. 11, reveals that the number of eligible voters was 73. With the exception of Jeremiah Santos, who was away on vacation during the voting sessions, only one eligible voter did not vote in the election.

objections alleging that the Board Agent was not prepared for the election, that there was noise in the voting area, that an observer's cell phone was visible, a brief twirl by a voter and the fact that the Board Agent asked an observer whether she had seen one of the voters place her ballot in the box and painted her fingernails while no voter was in the room, failed to raise a reasonable doubt as to the fairness of the election. Report at 52-57.

The Employer alleges that the Board Agent was unprepared for the election because she failed to bring roving observer signs with her. It ignores the fact that the roving observers were not part of the stipulated election agreement and that the Board Agent conducting the election was not made aware, prior to the election, of the agreement between counsel for the Employer and the Union regarding the use of roving observers. The parties stipulated at the hearing that the agreement regarding roving observers was a side agreement and was not part of the Board's stipulated election agreement. Tr. 1227-29. Furthermore, as found by the Hearing Officer, any claim that the preparation of two observer signs contributed to the delay in opening the polls did not affect the outcome of the election. Report at 48, 50-51. The Employer further excepts to the Board Agent's failure to read the Board's instructions to the observers. This claim is specious as both election observers testified that they read the instructions.

The Employer incorrectly claims that the Board Agent "knew that the voting process was deeply flawed" when she told the observers that the second voting session could not happen like the first one. Brief at 11. The Hearing Officer properly discounted this comment as hearsay. Even if this statement was to be considered, the Employer misstated the circumstances under which the Board Agent allegedly made this statement. Brief at 10-11. Both observers testified that the Board Agent referred solely and specifically to the fact that no more than one voter

would be permitted in the voting room at any given time. Tr. 347, 481-82.[3] The Board Agent did not make that statement about the voting process more generally, as claimed by the Employer.

The Employer further excepts to the Hearing Officer's finding that the voting booth used in the election provided adequate privacy for the voters. The Hearing Officer painstakingly evaluated the physical and testimonial evidence and found that the credible evidence fell far short of establishing that the secrecy of the balloting process was compromised by the use and placement of the voting shield. As detailed by the Hearing Officer, the testimony of witnesses who claimed that ballots could be seen by observers was contradictory, implausible and simply not believable. Report, 70-71. In its Exceptions, the Employer complains that the Hearing Officer discounted the testimony of Orozco because it was elicited through leading questions. It was entirely appropriate for the Hearing Officer to give no weight to that testimony; not only was it elicited almost entirely through leading questions, Orozco's testimony on cross-examination was fraught with contradictions. Further, as noted by the Hearing Officer, neither the Employer nor the Union objected to the voting shield or its placement prior to the start of the first voting session nor did Orozco complain about its placement to the Board Agent during the voting session. Tr. 116, 246-47.

The Employer claims that it is "undisputed" that the cardboard voting shield used was only a part of a voting kit and that the Hearing Officer thus erred by failing to find that the use of the voting shield without a base and /or legs was improper. Brief at 4. There was no evidence in the record to establish whether or not is customary for NLRB agents to use the shield alone or with a base. The Hearing Officer properly rejected the Employer's argument as speculative and

[3] Both observers Orozco and Napolitano testified that there had been no more than three voters in the room at any given time during the first voting session.

instead focused on whether voter ballots could be seen or whether employees reasonably thought their ballots had been seen. Tr. 73. Report at 58, n. 22.

The Hearing Officer found that there was no credible evidence that anyone's ballot was seen and that the voting booth provided adequate privacy. Her findings are amply supported by the record and recent and past Board precedent. In particular, the Hearing Officer properly noted the similarity between this case and *Physicians & Surgeons Ambulance Service*, 356 NLRB No. 42 (2010), where the Board rejected the employer's exception concerning the use of the three-sided shield, as opposed to a full voting booth. The Board found that there was no evidence that the ballot of any voter was actually seen. It also noted that the employer failed to object to the arrangement at the time of the vote. The Board distinguished the case from *Columbine Cable*, 351 NLRB 1087 (2007) and *Imperial Reed*, 118 NLRB 911 (1957) where no voting booth was provided and the ballots were visible.

Contrary to the Employer's claim, this case is not more similar to *Columbine.* In *Columbine,* where the petitioner won the election by a one vote margin, the two voters at issue voted after the NLRB voting booth was disassembled. They voted without a booth or in a private area and one of the voters testified that his ballot was 80% exposed. In the instant case, no witness testified that anyone saw his or her ballot.

In an effort to distinguish the instant case from *Physicians & Surgeons Ambulance Service*, the Employer argues that voters testified that their hands were visible to the observers. The testimony upon which it relies – that of Orozco and Dande -- was properly discredited by the Hearing Officer who found their testimony to be unreliable, unbelievable and utterly implausible. Other witnesses testified that they did not believe anyone could see their ballot because their

backs were to people in the room. Tr. 648-49, 1185, 1203. Indeed, one of the witnesses called by the Employer described the voting booth as a "private voting section." Tr. 727.

The Employer also argues that the voting shield in *Physicians & Surgeons Ambulance Service* was different than the one in the instant case. There is no record evidence to support that claim but even if there were, the fact remains that an NLRB voting shield was used and no ballot was seen by the observers or any employees waiting to vote. These determining factors support the Hearing Officer's reliance on *Physicians & Surgeons Ambulance Service* rather than *Columbine*. Finally, while the Employer vigorously objects to the use and placement of the voting shield in its Exceptions, it raised no objections to it on the day of the election. Indeed, the Employer took it upon itself to move the voting shield closer to the observer table in the second voting session. Tr. 248, 289.

B. THE HEARING OFFICER CORRECTLY FOUND THAT THE UNION'S CAMPAIGN LITERATURE DID NOT CONSTITUTE OBJECTIONABLE CONDUCT (Exceptions 1 and 2)

The Hearing Officer found that the record evidence did not support the Employer's Objection that the Union published literature and videos containing employee statements that were false or were obtained by deceit, misrepresentation, without employees' permission. In urging a rejection of the Hearing Officer's finding, the Employer repeatedly misstates, misrepresents and misconstrues the Hearing Officer's discussion of the evidence, her findings and her application of law.

1. The statements attributed to employees in the Union flyer were substantially the same, if not the same, as the comments on the release forms

Union Organizer Brian Walsh and Union Vice-President Rickey Elliott testified that the Union explained to employees that their photographs would be used for a Union flyer to be mailed to voters and that the Union tries to obtain a written release from employees. Tr. 55, 271;

Report at 5-6. As detailed by the Hearing Officer, the Union obtained responses to questions posed to employees as to how having a union would benefit them. These responses were entered on a release form, authorizing the Union to use the employees' photographs and comments in video tapes, printed materials, online media, advertisements, etc. While modifications were made to some of the employee statements in the published flyer, the modifications did not alter the pro-union sentiment expressed by employees on the release form, and, in the vast majority of cases, the changes were simple editorial corrections or clarifications.

The Employer presented two employee witnesses, Miguel Rogue and Fanny Mora, who testified that they did not authorize the Union to use their comments in the flyer.[4] Mora testified that she did not recall signing the release form, but conceded the signature on it was hers. The Hearing Officer found that she signed the release and credited her testimony that she did not enter the answers on it.[5] Rogue testified he did not sign a release but told his co-workers he wanted to join the Union and would be voting for the Union. Tr. 810. That testimony is consistent with the comment attributed to him in the flyer, that he was "voting yes for 1199."

The Hearing Officer correctly found that the record evidence established that only one employee, Rogue, failed to sign a release. The Employer asserts that the Hearing Officer's finding was contrary to the record because there were no release forms in the record from two other employees, Claudine Hunter and Hector Gonzalez, who are briefly quoted on the mailing

---

[4] These employees were employed by the Employer at the time of the hearing. As reflected in the record, the Employer was aggressively anti-union. The Board in *G.R.D.G., Inc.*, 323 NLRB 258 (1997), noted that the Supreme Court observed in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607-08 (1969), that employees are more likely than not to give testimony damaging to the union in response to questions by company counsel. The Employer called sixteen employee witnesses, 22% of the bargaining unit. During the course of their preparation by the Employer, employees were called in to meet with three different attorneys for the Employer for up to total of six meetings. *See e.g.*, Tr. 1056, 1057, 1063-64, 1090-92.

[5] In Exception 8, the Employer mischaracterizes the Hearing Officer's finding. The Hearing Officer considered Mora's statement in conjunction with the other evidence and case law to find that the flyer was not a basis for setting aside the election.

address portion of the leaflet. The Employer presented no evidence that these two employees did not authorize the Union to use their quotes. In fact, throughout the hearing and in its extensive closing argument, the Employer never claimed that these employees had not authorized the Union to use their quotes.[6] Moreover, the absence of a release in the record does not establish lack of authorization as urged by the Employer. Its repeated claim that three employees did not authorize the use of their quotes is unsupported by the record and false. Accordingly, the Employer failed to meet its burden of showing that Hunter and Gonzalez did not authorize the Union to include their statements on the flyer.

The Employer challenges the authenticity of some of the release forms on the ground that it believed that some of the handwriting was different on some forms or a portion was in different ink and criticizes the Hearing Officer for failing to address these alleged discrepancies. Brief at 22. The Hearing Officer, who examined the original releases, made clear on the record that she did not agree with the Employer's contentions.[7] Notably, the Employer did not even question its own witnesses to substantiate its claim about any of the alleged discrepancies.[8] Accordingly, the Hearing Officer did not err by failing to address this narrow issue.[9]

---

[6] The flyer was folded in quarters. The quarter on which these quotes appeared was the portion with the mailing address; these are the only quotes appearing on that quarter. It is apparent that the parties at the hearing overlooked these statements. The Employer repeatedly referred to 45 workers on the flyer, not 47, the number if Hunter and Gonzalez were included. Tr. 958. It very carefully examined each quote on the flyer and demanded the production of all releases from the quoted employees but never mentioned a missing release from Hunter and Gonzalez. Given the amount of time spent on the record discussing Roque's missing release, had the parties been aware of the Hunter and Gonzalez statements, the issue of their statements and releases would have been raised.

[7] The Hearing Officer properly rejected the Employer's claims concerning the ink and handwriting on the releases. *See, e.g., NLRB v. Media General Operations*, 360 NLRB 434, 443-44 (4th Cir. 2004).

[8] *See Er. Exh.*, 2 pages 18 (Dande), 49 (Santos). The Employer claims these releases are among those in different pen or handwriting. Both witnesses testified at the hearing yet the Employer never asked them whether entries on their release forms were not done by them.

[9] In Exception 3, the Employer misquotes the Hearing Officer. She did not state that "all [employee witnesses] admitted that the release froms [sic] in evidence contained their names and handwriting ...". Rather, she stated that "several employees testified . . . that the release forms in evidence contained their names and handwriting." Report at 10.

It is true that one of the employees, Jillian Jacques, made entries on some of the release forms of her co-workers. In almost all the cases, she made these entries after speaking to the employee and obtaining the answer to the question on the release form from the employee. With the exception of Roque and Mora, there is no evidence that the release form from any of the other employees contained entries that were not verbally communicated to Jacques, the Union or entered by the employee. [10] Report at 9-10. Furthermore, the Union had no knowledge that Jacques entered information on the release forms until she testified at the hearing on the Objections on October 14th. Tr. 428.[11] While the there is no release in the record for Roque, he testified that he told his co-workers he wanted to join the Union and was voting for the Union. Tr. 810-11. In sum, the record and findings of the Hearing Officer reveal that only Mora did not make the statement attributed to her in the flyer and that only Roque did not sign a release form. As discussed above, there is no evidence in the record that Hunter and Gonzalez did not authorize the Union to use the statements on the leaflet.

The Employer also argues that the Hearing Officer erred in failing to discredit Jacques. The Hearing Officer found Jacques' testimony to be straightforward and that the record reflected

---

[10] Jacques testified that she entered the answers to the two questions on the release of Maria Berrios, without obtaining them from her at the time Berrios signed the release. However, as noted by the Hearing Officer, Berrios signed another release in Spanish, stating that the Union would improve her life with better salary, hours and respect. Report at 10. The statement in the flyer, that Berrios was voting yes for educational opportunities, is in the same spirit as the Spanish language release and her statement on the videotape that she wanted to form a union for more benefits ..." Pet. Exh. 5.

Also without merit is the Employer's exception to the Hearing Officer's finding that the quote used for Annie Stubbs came from portions of the release she filled out. Exception 4. Not only did Jacques testify that Stubbs wrote the response to the first question on the release – the answer quoted in the flyer – but an examination of the handwriting confirms Jacques' testimony in this regard. The Employer further notes that Stubbs did not testify. It was the Employer's burden to rebut the testimony of Jacques but it failed to do so or otherwise proffer any evidence contrary to the evidence in the record.

[11] Nor did the Union authorize her to enter the information. Tr. 428. Jacques was not an agent of the Union. While she arguably may have been while serving an observer, she was not in connection with the release forms. *See e.g., Advance Products Corp.,* 304 NLRB 436 (1991); *United Builders Supply Co.*, 287 NLRB 1364 (1988). The acts of a third party cannot be the basis for setting aside an election unless the conduct is so aggravated that it created a general atmosphere of fear and reprisal rendering a free election impossible. *Westwood Horizons Hotel*, 270 NLRB 802 (1984).

no testimony to rebut her testimony concerning the releases. Report at 11. While the Employer relies on the testimony of Jacques that she completed portions of the release forms, it urges that she should be discredited on all other counts. The Employer cannot have it both ways.

Finally, the Employer repeatedly makes a technical argument that the release form limits the authorization to comments made on the date of the form. Brief at 25. First, there is no requirement that the Union obtain release forms. Nor is there any legal restriction on the Union's right to publish statements employees knowingly and voluntarily provide to the Union.[12] Second, the issue in this matter is not whether the Union followed the release forms with absolute precision; rather, the issue is whether the quotations in the Union's leaflet constituted objectionable conduct.

As properly found by the Hearing Officer, the statements used in the Union's leaflet were substantially similar to the answers the employees provided on the release forms. The Hearing Officer correctly found that the fact that the employees did not specifically state on the forms that they were "voting yes" for the Union did not constitute a substantial misrepresentation. Report at 13. The comments made on the release forms by employees most certainly communicate that they were in favor of the Union; they were in response to the questions on the Union's form, "How does having a union improve your life and/or the life of your family?" "How does having a union help provide better care?" If the employees did not support the Union, they would not have answered these questions describing the benefits of having a union. Nor would they have agreed that the Union could use their comments and photos in publications.

---

[12] The Employer's argument would restrict the Union from using pro-union statements employees made while they knew the Union was videotaping them. This technical objection would embroil the Board in wasteful inquiries. For example, if an employee signed and dated the form and left the comment section blank on one day but subsequently added a comment on a different day, the employer would argue that the comments were unauthorized because they were not entered on the day the form was dated.

2. The Hearing Officer correctly found that *Allegheny Ludlum Corp.* is inapplicable to this case

The Employer argues that the Union's use of photographs and videotapes of employees was objectionable under *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001). *Allegheny Ludlum Corp.*, addressed the use of videotaping of employees by employers for use in campaign material and its holding has never been applied to unions. Under the Board's reasoning, the case cannot be applied to union videotaping, as the decision turned on the Act's protection of employees from polling and interrogation of union sentiments by their employer. As noted by the Hearing Officer, this prohibition against polling and interrogation has been held by the Board not to extend to unions. Report at 16-17. *See also, Gormac Custom Manufacturing, Inc.*, 335 NLRB 1192, 1199 (2001), quoting *Maremont Corp. v. NLRB*, 177 F.3d 573, 578 (6th Cir. 1999) ("'[A] union seeking to represent employees has a different relationship to them that makes pre-election polling less coercive' than the same activity conducted by an employer.") Thus, the Employer's claim that there is no valid legal basis for not applying *Allegheny Ludlum Corp.* to union conduct flatly ignores well-established precedent.

Finally, there is no evidence in the record that the use of employee photographs or the videotape interfered with employee free choice. *Sprain Brook Manor Nursing Home*, 348 NLRB 851 (2006). The employees here, unlike those in *Allegheny Ludlum Corp.*, had affirmatively expressed support for the Union either through signing releases, cards or in discussion with their co-workers.

3. The Hearing Officer properly found that the Union flyer was not objectionable

Relying on *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the Hearing Officer correctly found that the insignificant modifications of employee statements in union

campaign propaganda do not constitute grounds for setting aside an election. Report at 11. In *Midland National Life,* the Board held that it would not set aside election results on the basis of misleading campaign statements; it limited its intervention to cases where a party has used "forged documents which render voters unable to recognize propaganda for what it is." *Id.* at 133. The Board has consistently held that misrepresentations or false or misleading statements by a party do not constitute grounds for setting aside an election. *See e.g., TEG/LVI Environmental Services, Inc.*, 326 NLRB 1469 (1998) (Flyer stating "The National Labor Relations Board … wants the workers of TEG/LVI environmental services to have a union" not objectionable because the document was clearly identified as one distributed by the union); *AWB Metal*, 306 NLRB 109 (1992) ("The only exception to this [*Midland*] rule specified by the Board was that it would set aside an election where a party has used forged documents which render voters unable to recognize propaganda for what it is."); *Maremont Corp. v. NLRB*, 177 F.3d 573, 578 (6th Cir. 1999) (The Court held that assuming the top of the "vote yes" petition was obscured by the union, such that employees were unaware of what they were signing, that would be an insufficient basis for setting aside the election, noting that the hearing officer found the handbill to be a typical partisan leaflet.)

Even if Morra did not make the statement attributed to her and Rogue did not sign a form authorizing the Union to use his statement in the flyer, the publication of the employees' statements does not constitute objectionable misrepresentation.[13] In *BFI Waste Services*, 343 NLRB 254 (2004), n. 2, the Board found that alleged misrepresentations of two employees were not pervasive, and stated that while the Board does not condone the creation and attribution of quotes, the conduct in that case did not warrant overturning the election. Under *Midland National Life Insurance Co.*, the Board could not reach a different result. The *Midland* Board,

[13] *Albertson's Inc.*, 344 NLRB 1357 (2005) is inapposite as there the union had forged a document.

after careful analysis of the history of its decisions in the area, made clear that with the exception of forgery -- where no voter could recognize a document as propaganda – so long as campaign material is mere propaganda of a party, the Board will not probe into allegations of misrepresentation. "[O]bjections alleging false or inaccurate statements can be summarily rejected at the first stage of Board proceedings. . ." *Id.* at 132. Of particular concern to the Board was narrowing the range of objections to limit opportunities for parties to delay certification of election results. Here, the flyer was unquestionably Union propaganda and, thus, any alleged misrepresentations contained in it provide no basis for overturning the election.

The Employer makes a further claim that the Union obtained employee photos through "deceit or misrepresentation and/or without permission," affirmatively misleading employees about the use of the photos. Exception 68, Brief at 30. Organizer Brian Walsh told employees their photos would be used for a Union flyer. As discussed above, only two employees made any claim that their photos and comments attributed to them were used without authorization and one of them, Miguel Rogue, testified that he knew his photo was being taken by a co-worker and he told that co-worker at the time that he wanted to join the Union.

No evidence was presented that any employee was deceived into signing a release.[14] Mora who testified that she signed the release form, did not testify that she was deceived into doing so. Neither Dandy nor Rice or any other employee testified that the Union deceived them into signing releases. While the Hearing Officer credited Mora's testimony that she did not fill

---

[14] In its Exceptions 57 and 58, the Employer argues that the Hearing Officer erred by refusing to enforce the Employer's subpoenas for the testimony of Isabelita Sombillo and Eliza Bates. The Employer's counsel stated that because of the purported disparity between the statements on releases and in the flyer, he wanted to question Bates about the source of the quotes or whether the Union condoned the creation or attribution of the quotes. Counsel posited that "there may be an employee who signed a release and didn't know what they were signing." Tr. 958-60. The Hearing Officer correctly ruled that Bates' testimony was not necessary. Tr. 963. If the Employer wanted to produce evidence that employees did not authorize the Union to publish their comments or they did not know what they were signing, the Employer could have called employees to testify directly on that point. It elected not question employee witnesses on these issues and sought to engage in a fishing expedition of Union agents.

out the answers on her form, this instance, even if considered together with the absence of a release form from Rogue, does not establish that the alleged misrepresentation was pervasive. *BFI Waste,* 343 NLRB 254.

Here, there is no forged document and there can be no question that employees knew the flyer was election propaganda from the Union. In apparent recognition of this, the Employer argues that an exception to *Midland* was carved out by the Court of Appeals for the Sixth Circuit in *Van Dorn Plastic Machinery, Inc.*, 736 F.2d 343, 348 (6th Cir. 1984), which stated that there may be cases where forgery cannot be proved but where "the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate the truth from untruth where their right to a free and fair choice will be affected." The Board has never expressly adopted such a carve-out and notably, the Court of Appeals referred to the "carve-out" articulated in *Van Dorn* as mere dictim. *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178 (6th Cir. 1988).

Nonetheless, the Hearing Officer evaluated this objection under *Van Dorn* and found that there was no evidence that any employee was deceived into signing a release. Report at 15. The Employer argues, however, that the Union's flyer constitutes a clear misrepresentation of employee sentiment and such deception tainted laboratory conditions. While the flyer does not contain exact quotes from a number of employees, it cannot be said that the comments attributed to employees in the flyer misrepresented the employees' expressed sentiment. The clear sentiment of the employees is that they supported the Union and they thought the Union would improve their lives, and in some cases, help employees provide better care.[15]

---

[15] Contrary to the Employer's claim, the Hearing Officer did not misapply *Gormac Custom Manufacturing*, 335 NLRB 1192, Brief at 34; Report at 13. There the Board adopted the findings of the ALJ, who stated that although the union's petition did not specifically state that the employees agreed to vote for the union, and that the language authorizing the union to use employee signatures on leaflets was not as specific as it might have been, the fact that the petition stated that employees authorized the union to represent them was a sufficient basis for finding no misrepresentations when the union published a leaflet stating they were voting yes. The ALJ further found that while the evidence revealed that not all the employees who signed the petition ultimately voted for the union, the

Finally, the Employer invites the Board to adopt a new standard, articulated in Member Meisburg's concurrence in *BFI Waste Services,* where he referenced "some sort of 'fair use' rule."[16] Such a rule would open floodgates of the type of litigation the Board sought to end in *Midland National Life Insurance Co.* Applied in a case such as this, it would permit an objecting party to challenge any employee statement of support that was reproduced and inquire about the circumstances of each statement. It would represent an end run around *Midland's* efforts to stem "endless delay" in the election process and promote uniformity in this area of labor law.

Finally, not a single employee testified that the statements in the Union's flyer influenced their vote nor is there a scintilla of evidence in the record to support such a claim. *T.K. Harvin & Sons,* 316 NLRB 510, 536 (1995). If such evidence existed, the Employer, who questioned eighteen employee witnesses, would have elicited it.[17]

C. THE HEARING OFFICER CORRECTLY FOUND THAT THE UNION DID NOT ENGAGE IN IMPERMISSIBLE ELECTIONEERING (Objections 4 & 12)

The Employer excepts to the Hearing Officer's finding that telephone calls and text messages from the Union to voters on the day of the election did not constitute objectionable conduct. The Hearing Officer based her finding on the fact that there was no evidence that any voter received a call or text message while on line waiting to vote, that the three employees who

---

union's circulation of the leaflet based on the earlier commitments it received from employees was not the type of artful or pervasive misrepresentation that impacted the election.

[16] Meisburg described a rule protecting the reproduction of employee signatures affixed to one medium and used for another.

[17] Thus, the Employer's argument that the Hearing Officer failed to consider that the flyer had the effect of "locking in" employees to a position has no merit. Exception 54. There is nothing in the record that contradicts that the employees who appeared in the flyer supported the Union. Further, in its Brief, the Employer misquotes the Board in *Allegheny Ludlum* 333 NLRB 734, 744. There the Board commented that employee Section 7 rights are further infringed in cases where the employee's actual position in support for the union is in variance with the employer's statement. Here, there was no evidence that any of the employees on the flyer did not support the Union. Moreover, for the reasons discussed above, the rationale in *Allegheny Ludlum* does not apply to unions.

testified that they read the text message read it after they voted, and that Walsh and Venette did not know where employees were physically when they texted and phoned them.

There is no prohibition against unions contacting voters on election day to encourage support and encourage voters to get to the polls so long as they do not run afoul of certain election rules, discussed below. The lengthy record, containing the testimony of 21 witnesses called by the Employer, demonstrates that no voter was near the voting area when the messages were received or viewed by the employee and that neither Walsh nor Venette were near the polling area or the Employer's facility when they made phone calls or when Walsh sent text messages. Tr. 120-21; 756.

The Employer misconstrues and exaggerates testimony to support its claims of impermissible electioneering. It states that the Union told employees that they knew which employees had voted or not. Only one employee, Keisha Rice, received a message telling her to vote, noting that she had missed the first session. As discussed below, that communication was based on an inaccurate assumption by the Union; as found by the Hearing Officer, Rice had voted in the first session.[18] Report at 37.

The Employer alleges that the text messages sent by Walsh telling voters to vote yes and that "we are winning" were objectionable and that the Hearing Officer erroneously credited Walsh's testimony that his text message was based on the Union's polling prior to the election, rather than on information about the actual election. Report at 31, 47; Brief at 38. To support its position, the Employer takes an answer to an ambiguous question out of context. The testimony immediately preceding Walsh's answer to the Employer's question, describes the basis on which Walsh claimed, "we are winning":

---

[18] Additionally, the Hearing Officer found Venette to be more credible than Rice. Report at 37.

A. Throughout the campaign we remained 70 percent showing support for – to the Union and just based off of us having 70 percent filed for the election and the overwhelming number of people on the picture and quote piece, there was no reason to believe we weren't.

Q. Did you make the statement because you were keeping track of voters?

A. No.

Q. And by "We are winning" you meant winning the actual balloting; is that correct?

A. Yes.

[Union counsel:] Objection.

Tr. 97-98. The Employer rests its claim on its incorrect interpretation of Walsh's answer to this awkward question. Not only is it clear from Walsh's testimony that his belief that the Union was winning was based on information the Union had prior to the election, Walsh affirmatively denied tracking voters in response to counsel's question. Accordingly, the Hearing Officer correctly interpreted Walsh's testimony.[19]

With respect to the phone calls made by Venette on election day, the Employer contends that the Hearing Officer's finding that Union Organizer Jean Venette was credible was "completely illogical, as Venette's explanation is nonsensical." Brief at 39. It argues that if he believed Keisha Rice was going to vote in the morning session, (based on his phone conversation

---

[19] The Employer repeatedly attacks Walsh's credibility by misconstruing his testimony. For example, it states that Walsh testified that he only texted five voters during the afternoon voting session and did not text any voters during the morning session. Brief at 37. Walsh testified that he texted "*approximately*" five employees in the afternoon. Tr. 88. (emphasis added). With regard to the morning session, he was asked, "Approximately how many text messages *identical to or similar to Employer 3* did you send voters?" to which he accurately responded, he didn't recall sending any. Tr. 89 (emphasis added). He was not asked whether or not he simply texted voters during the morning session; rather, he was asked if he sent text messages with the same content as Employer Exhibit 3.

The Employer further misconstrued Walsh's testimony when it stated that he changed his story when called by the Union and after the Verizon records were produced, at which time he testified that he had texted "a lot" of people on the day of the election. Brief at 37. The testimony that he texted a lot of people referred to the text messages he sent at 4:45 p.m., after the vote count, in which he texted the Union's victory. Tr. 1107-08. All the questioning by the Employer, as well as the Verizon records, pertained to text messages prior to the closing of the polls.

The discrepancies between Walsh's testimony and the Verizon records were not significant. The failure to recall the exact number of calls or text messages sent on a hectic voting day, at a hearing well over a month after the election, does not undermine Walsh's credibility. Nor does his failure to recall that one employee returned his call on election day. Brief at 39. His testimony that he texted employees who were not scheduled to be at work on voting day is not rendered non-credible because one of the employees he texted, Pratts, was at work that day. Brief at 38.

the previous day), there is no reason he would have called to remind her to vote after the first voting session. Venette explained that after the first voting session Walsh told him to call her and six other employees who worked the evening shift to remind them to vote. Rice, who was an evening shift employee, was on that list. Tr. 748 Venette testified that when he received the list, he assumed that Rice did not vote even though she had told him the day before that she planned to vote in the morning. He therefore left the message reminding her to vote because she missed the first session.[20] This is hardly an "illogical and nonsensical" explanation as claimed by the Employer.[21]

Taking a different tack, the Employer argues that the only way Walsh could have believed that Rice did not vote in the morning session would have been if the Union had been tracking voters. However, if the Union had been tracking voters it would have known that Rice voted in the morning session. Report at 37. And, as discussed below in Section D, if the Union had been tracking voters, Walsh would not have sent text messages in the afternoon to employees who had already voted.

The Employer also challenges Venette's credibility on the ground that he claimed to have made all his phone calls on voting day from the office phone as opposed to his cell phone. Brief at 40. The Employer misconstrues his testimony. Venette testified that the seven calls he made between 11 am and 1 pm were made from the office phone, not that all his calls that day were made from the office phone. Tr. 746, 755-56. Contrary to the Employer's claims, the Verizon

---

[20] Venette could have thought Walsh's belief that Rice had not voted in the morning session was based on a comment Walsh may have heard from any number of employees.

[21] In Exception 29, the Employer mischaracterizes the statement of the Hearing Officer, claiming that the Hearing officer found, contrary to the record, "that there was no evidence that Walsh or Venette indicated in a message that they knew whether an employee had already voted ...." It conveniently omitted the first part of her sentence that stated, "With the exception of Venette's message to Rice, ..." Report at 39-40.

cell phone record supports Venette's testimony that no cell phone calls were made by him to potential voters during those two hours.

The Employer further contends that the Union engaged in objectionable electioneering based on the testimony of Beauvoir, who stated that she received a call from a Union representative the evening before the election, asking her how she was going to vote, and Mora, who stated that a representative asked her, on voting day at a time when the polls were open, whether she had voted. The Hearing Officer properly found that neither inquiry constitutes objectionable conduct. Report at 40.

1. The text messages and phone calls did not violate the *Peerless Plywood* rule

The Employer argues that the text messages and phone calls made to employees on election day violate the *Peerless Plywood*, 107 NLRB 427 (1953), prohibition against election speeches made to massed employees on company time within 24 hours before the election. The Hearing Officer correctly rejected this claim, finding no massed assembly of employees and that the telephone calls and text messages were akin to literature. She properly referred to *Virginia Concrete Corp.*, 338 NLRB 1182, 1187 (2003), where the Board found that text messages sent by an employer to employees that appeared on screens mounted on the dashboard of their company trucks, was analogous to campaign literature rather than campaign speech. *See also, Mail Contractors of America v. NLRB*, 122 Fed. Appx. 635, 639 (4th Cir. 2005), 176 L.R.R.M 2832 (screen saver message programmed onto employee work computers "is dissimilar from the 'captive audience' speech at issue in *Peerless Plywood*, as it lacks the potential to create a mass psychology . . . ."), *Veritas Health Services, d/b/a Chino Valley Medical Center,* 2009 WL 136549; Case No. 31-RC-8689, JD(SF)-02-09 (January 16, 2009), slip op. at 15-16 (employer

"vote no" email to employees analogous to campaign literature rather than a speech as it was not audible and could have been unopened or deleted if employees so chose).

The Employer's efforts to distinguish the instant case from *Virginia Concrete* are unavailing. It argues that in *Virginia Concrete*, the message was sent to individual employees, not a massed assembly or employees working near each other. Here, the text message sent during the afternoon voting session was sent to nine individuals, and aside from Pratts showing her message to Mabilagan, there is no evidence than employees working near each other saw the same message. Indeed, the facts here are stronger than in *Virginia Concrete*, where the employer sent text messages to all drivers at work on the modem used for work. Consistent with all the decisions addressing analogous communications, the Hearing Officer properly found that text messages are comparable to campaign literature rather than to campaign speeches or sound truck broadcasts. Unlike speeches or broadcasts, text messages are not audible and can be avoided; they can be deleted or scrolled past. Further, as demonstrated in this case, even if the recipient chooses to read the message, it may not even see the message until long after it is sent.

2. The text messages and phone calls did not violate the *Milchem* rule

Similarly without merit is the Employer's claim that the text messaging violated the *Milchem* rule against prolonged conversation in the polling place while voters are waiting in line to vote. *Milchem, Inc.*, 170 NLRB 362 (1968). As found by the Hearing Officer, there is no evidence that any employee received a call or text message while waiting in line to vote.[22] Nor is there any evidence that any employee was even near the voting area when the message came

[22] Venette's telephone calls were not made during the voting sessions; they were made between sessions from 11:00 am to 1:00 p.m. There is no evidence that the phone calls made by Walsh at the end of the first voting session related to electioneering or that Walsh even left a message, or if he did, that the message was heard by the employee.

through. In fact, the employees testified that they did not even see the text messages until after they voted.

Even if there had been evidence that employees who received the text message had read it before voting, or even while in line to vote, there is no authority for texting to fall within the *Milchem* rule. First, campaigning on election day, while the polls are open, is permissible. Second, there was no conversation here, let alone prolonged conversation. Third, implicit in *Milchem* is a requirement of physical presence that attracts the attention of employees in line to vote and is unavoidable. Fourth, as noted above, text messages can be ignored, deleted, scrolled past or not seen until long after they are sent. Finally, the Board may take administrative notice that it is increasingly common for candidates running in local and national elections in this country to send mass emails and to robo call voters throughout election day when some of them are presumably waiting in line to vote.[23]

D. THE RECORD FULLY SUPPORTS THE HEARING OFFICER'S FINDING THAT ROVING UNION OBSERVER JACQUES DID NOT ENGAGE IN IMPERMISSIBLE ELECTIONEERING (Objections 3 and 13)

The Employer claims that the Union's roving observer, Jillian Jacques, told employee Maharanie Mangel to vote yes. In evaluating this Objection, which turns entirely on the credibility of the witnesses, the Hearing Officer properly credited the testimony of Jacques and Mangel over the testimony of the Employer's witnesses in finding that no such comment was made by Jacques. The Hearing Officer's credibility findings were methodical, thoughtful and fully supported by the record. Report at 25-28.

In challenging the Hearing Officer's findings, the Employer blatantly misrepresents the record. It states that Mangel admitted she "didn't know whether Jacques had told her to 'vote

[23] The Employer asserts that a voter's phone rang while she was voting but there is no evidence who phoned that employee.

yes' or not." Brief at 44-45. The record reflects the opposite. Mangel clearly and consistently testified that Jacques told her that the voting time had been extended by 15 minutes and she could go and vote. Tr. 1181, 1196. She affirmatively testified that Jacques never told her to vote "yes." Tr. 1184.

The Employer further misrepresents the record when it argues that the Hearing Officer erred by finding that the Employer's election observer, Ikurekong, was present when Jacques allegedly told voters to vote yes. Brief at 45; Report at 26. Konjoh testified that Ikurekong was across the hall, several feet from Jacques when Jacques allegedly told Mangel to vote yes. Tr. 887. *See also*, Er. Ex. 5 and 6 which show the width of the hallway. If Dande claimed to have heard Jacques tell employees to vote yes a couple of times that morning and Speas claimed to hear her when he was on the other side of the wall and Orozco testified Jacques was so loud that she could hear her voice in the voting room, there is no question that Ikurekong would have heard what Jacques said to Mandel if she was standing on the other side of the corridor. Tr. 484, 573, 692-93. The Hearing Officer correctly noted that her consideration of the Employer's failure to call Ikurekong is appropriate to an evaluation of whether a party has met its burden. Report at 26, n. 9. In this case, where the Employer called so many employee witnesses, its failure to call Ikurekong on this issue speaks volumes.

Finally, the Employer excepts to the Hearing Officer's finding that the testimony of Jacques was credible, based largely on her entries on some of the release forms. Jacques readily admitted in her testimony that she made entries. If she testified untruthfully, she would not have made these admissions. The Employer's other line of attack on Jacques' credibility was that she first denied having any "conversations" with voters while serving as an observer and subsequently testified that she advised Mangel. As found by the Hearing Officer, Jacques

testimony that she did not consider her brief interaction with Mangel to be a conversation was not inconsistent with her prior testimony. In sum, the Hearing Officer's factual findings and assessment of the credibility of the witnesses are firmly supported by the record.

E. THE HEARING OFFICER CORRECTLY FOUND THAT THE UNION DID NOT KEEP A LIST OF EMPLOYEES WHO VOTED OR CREATE AN IMPRESSION OF SURVEILLANCE (Objections 5, 6 and 11)

The Employer argues that the Hearing Officer erred by failing to find that the Union maintained a list of who voted, that the Union's observer was texting on her cell phone during the vote, that the Union called voters while the polls were open and said they knew who had not voted, that Union agent asked employees if and how they voted and sent text messages to voters stating "we are winning." [24] Brief at 49.

As found by the Hearing Officer, the record evidence does not support these claims. First, the Employer presented no evidence that the Union maintained a list. Indeed, the record established the contrary. Second, despite the Employer's efforts to create a record that Napolitano was texting or keeping a list on her cell phone as to which employees voted, none of the 16 employees who testified disputed the testimony of Napolitano, Walsh, Venette and Elliott, that Napolitano did not keep a list. As noted by the Hearing Officer, the Employer's observer Orozco did not even provide any support for the Employer's claim. Third, the Hearing Officer correctly rejected the Employer's argument that Walsh admitted in his testimony that the text message, "we are winning" was based on actual balloting, rather than the Union's pre-election

---

[24] The Employer argues that the Hearing Officer erred in excluding hearsay testimony from Orozco concerning a statement made to her by Pratts. Brief at 46, n. 21. The Hearing Officer's hearsay ruling was correct. Pratts was called by the Employer to testify but the Employer did not ask Pratts about the statement herself. In addition, the Hearing Officer found Orozco not to be a credible witness. Report at 62-63, 69. Contrary to the Employer's claim, Walsh's text message does not, in any way, corroborate Orozco's hearsay. Finally, the Employer did not file a specific exception to this ruling in its Exceptions.

polling.[25] Indeed, she properly noted that Walsh would not have sent the text message to employees who had already voted if the Union had been tracking voters through its observer Napolitano. Report at 47. Finally, the Employer's claim that Venette's phone message to Rice established that the Union was tracking voters proves the opposite inasmuch as Rice had already voted in the morning session, prior to Venette's call to her. Report at 47.

The Employer asserts that Union agents asked employees if they voted and how they voted. The Hearing Officer found that Union's observer, Jacques, who was a roaming observer with a sign telling employees it was time to vote, asked two employees if they had voted yet. Both had voted and one of the employees testified that when he stated he had voted, Jacques asked how he voted. This employee had voted shortly before the polls closed and testified he had this interaction with Jacques at 4 p.m., the time the polls closed. The Hearing Officer found no merit to this Objection on the ground that the comments were made after the voters had voted. Report at 30.

The Employer further asserts that the Union created an impression that it won the election by sending a text message to Beatrice Beauvoir, at 10:00 a.m. that the Union "won." The Verizon records reveal no text message to her at 10:00 a.m. The Employer takes a further leap that the same message was sent to Michelle Moore at 11:20 a.m. because both employees received a text message at 11:20 a.m. If anything, Moore corroborated Walsh's testimony that after the vote count, at around 4:30 p.m., he sent many text messages to employees saying "we won". She testified that she read that message after 5 p.m. The Employer's further argument, disputing the credibility of Walsh's testimony that he sent this victory message because the messages did not appear on the Verizon records, is utterly disingenuous. Brief at 48. The

[25] See discussion above at 16-17, regarding the Employer's ambiguous question to Walsh and the Hearing Officer's correct interpretation of his answer.

Verizon records, that the Employer subpoenaed did not include any texts after 4:00 p.m. on election day; they were for the period 5:45 a.m. to 4:00 p.m. Tr. 936-37, Er. Exh. 17 and 18.

Regarding Napolitano's alleged tracking of voters, there is no evidence of any written list because none exists. That Napolitano ran her finger down the list and stated some people did not vote is not evidence of keeping a list of who voted. If anything, it reflects her naivete about the process. As noted by the Hearing Officer, such a comment is not objectionable. Report at 46, citing *NLRB v. WFMT*, 997 F.2d 269, 277 (7th Cir. 1993)("[N]o eligible voters were present in the polling area at the time Terkel [election observer] commented on who had not voted.").

The Employer further objects to the Hearing Officer's failure to find – from a record completely void of such evidence – that Napolitano was keeping a list of voters. It argues that while the Verizon records confirm that Napolitano did not send text messages during the voting session, "this does not rule out the possibility that Napolitano was keeping track of who voted on her cell phone's note pad or other programs." Brief at 49. The Employer had ample opportunity to establish that voters saw her typing into her phone but no witness supported the Employer's speculation. Even its observer, Orozco, who sat next to her during the voting, testified that she did nothing more than touch her cell phone. The Employer's speculation that something "could be" is no substitute for actual evidence.

In rejecting the Employer's Objections, the Hearing Officer correctly found that not only was there no evidence that the Union or its observers kept a list of who voted, she further found no evidence that employees could reasonably infer that their names were being recorded. Only three of the 16 voters who testified stated that Napolitano touched her phone and only Dande mentioned texting, but subsequently admitted she did not know what Napolitano was doing with her phone. Report at 43. None of them suggested that they thought their names were being

recorded. The Hearing Officer particularly noted that the Employer's observer did not support the Employer's claim.[26]

Contrary to the Employer's claim, *Indeck Energy Services of Turner Falls, Inc.*, 316 NLRB 300 (1995) does not support its case. In that case, the Board found that even though the Union's election observer removed and copied the official voter list shortly before the election, the employer was unable to show or support an inference that employees were aware their names were being recorded or that they even suspected this. *See also, Chrill Care, Inc.*, 340 NLRB 1016 (2003). Such is the case here: not a single employee testified that they believed their names were being recorded by Napolitano or that a list was being kept by the Union.

Accordingly, the Hearing Officer's finding that the Union did not keep a list of voters or engaged in surveillance is fully supported by the record.

CONCLUSION

For the forgoing reasons, the findings and recommendations of the Hearing Officer should be adopted and a certification of representation issued.

Dated: March 28, 2011

GLADSTEIN, REIF & MEGINNISS, LLP

By: _____
Ellen Dichner
817 Broadway, 6th Floor
New York, New York 10003
(212) 228-7727
Fax: (212) 228-7654

J:\ED\1199 NJ\Somerset\Objections case\Brief on Exceptions.doc

[26] *Cross Pointe Paper*, 330 NLRB 658 (2000) is distinguishable. In that case, the observer was writing on a piece of paper that was visible to voters. In addition, he later admitted to an employee that he kept a list of who he thought voted yes and no. Here, the Union's observer was not writing on a piece of paper and there is no evidence that she was even touching the keypad on her phone. Further, Napolitano and the Union representatives testified no list was kept.

CERTIFICATE OF SERVICE

The undersigned certifies that Petitioner's Answering Brief to the Employer's Exceptions to the Hearing Officer's Report and Recommendations on Exceptions is being filed with the National Labor Relations Board on this 28th day of March 2011 via electronic filing upon:

Rachel Mead Zweighaft, Hearing Officer
National Labor Relations Board, Region 29
Two Metro Tech Center
Brooklyn, NY 11201

J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 6th Floor
Newark, NJ 07102-3115

Jonathan Kaplan, Esq.
Kiesewetter Wise Kaplan Prather, PLC
3725 Champion Hills Drive, Ste. 3000
Memphis, TN 38125

Tom Curtin